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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1936.

No. 532.

UNITED STATES OF AMERICA,
Petitioner,

AGAINST

MORGAN BELMONT and ELEANOR R. BELMONT, as Executors of the Last Will and Testament of AUGUST BELMONT, Deceased,
Respondents.

Brief of John R. Crews, as Receiver, *Amicus Curiae.*

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Opinions Below.

The opinion of the United States District Court for the Southern District of New York (R., p. 17) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 85 Fed. (2d) 542 (R., p. 22).

Statement.

Plaintiff seeks, in this action at law, to recover a bank deposit made with the firm of Belmont & Company by a Russian corporation prior to 1918. Plaintiff's claim

of title rests upon (1) the making of the deposit by the Russian corporation, (2) the nationalization of that corporation and the confiscation of its assets by the Russian Government in 1918, and (3) the assignment of certain claims of the Russian Government to the plaintiff in the letters passing between the President of the United States and M. Litvinoff in November, 1933, when diplomatic recognition was accorded to the Russian Government by the President.

Defendants, who are executors of the estate of August Belmont (the banker) moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The motion was granted by the District Court, the judgment entered thereon was affirmed by the Circuit Court of Appeals and the case comes to this Court upon certiorari granted.

Subsequent to the argument of the appeal in the court below, John R. Crews was appointed, by the Supreme Court of New York, Receiver of the Assets in New York of the Russian corporation under the terms of a statute which became law in June, 1936, and which is known as Section 977-b of the Civil Practice Act. The Receiver moved to be allowed to intervene and become a party to the action, joining in the motion to dismiss the complaint. This motion was denied. Since the defendants make no claim to the deposit and are stakeholders only, the Receiver is the real party in interest and files this brief, *amicus curiae*.

Question Presented.

1. Whether the public policy of the State of New York, which is the *situs* of the debt represented by the bank deposit, permits the recognition of rights based upon confiscation of private property.

2. Whether the public policy of the United States differs from that of New York.

3. Whether, if there be a difference between the public policy of the United States and the public policy of New York, the courts of the United States sitting in New York are not bound by the public policy of the State of New York as expressed by the highest court of that State and by the Legislature of the State in the enactment of Section 977-b of the Civil Practice Act.

4. Whether the so-called "Litvinoff Assignment", properly construed, embraces the bank deposit in question

(a) in view of the language of the instrument;

(b) in view of the historical and legal background existing when the assignment was made.

5. Whether the President had the *power*, without authority from the Congress, to accept an assignment of a claim in suit?

Summary of Argument.

I.—The enforcement of rights based upon the confiscation of private property by a foreign government will not be given extra-territorial effect by the courts of New York, the *situs* of the debt in question, because such confiscatory decrees offend the public policy of the State of Ne wYork as laid down by its court of last resort and by its Legislature (Civil Practice Act, §977-b).

II.—The enforcement of claims based upon such confiscatory decrees also offends the public policy of the United States. Even if such enforcement does not offend the public policy of the United States, the courts of the United States, sitting in New York, must give effect to the public policy of the State of New York as laid down by its Legislature and courts.

III.—The parties did not intend by the "Litvinoff Assignment" to include assets located without the boundaries of Russia, formerly belonging to private Russian corporations. To give to the document the meaning contended for by the United States, renders meaningless paragraph "(a)" of the Litvinoff letter. Under paragraph (a) the Soviet Government agrees not to make any claim with reference to

> "rights or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest."

The claim against Belmont & Company is a right in which a Russian national may have had an interest. If the first paragraph of the letter was meant to carry an assignment of that right, paragraph (a) becomes meaningless because one does not agree not to make a claim to that which he has just assigned. It follows that the rights referred to in paragraph (a) (which includes the right in suit) were not the same rights as those which were assigned by the preceding paragraph.

The interpretation contended for by the United States ignores the historical and legal background existing when the assignment was made. The United States would have the Court hold that the parties intended, by the use in the first paragraph of the letter of the vague term "or otherwise", to include claims which the courts of the United States, of New York, of Great Britain, of France, of Germany, of Denmark and of Switzerland, had held unenforceable and which are based upon confiscatory decrees which the Government of Russia itself has said were not intended to have extra-territorial effect. In the light of this background it is inconceivable that, if the parties had intended to assign and to accept the assignment of such claims, they would not have described them with greater precision than by using the words "or otherwise".

IV.—The President is without power to accept from a foreign government the assignment of claims against American citizens, such as the one in suit.

The President has only such powers as are granted to him by the Constitution, or acts of Congress, and the powers incidental thereto.

The agreement with M. Litvinoff has never been ratified by the Senate or approved by Congress.

Claims such as the one in suit, could not have been enforced by the Russian government itself, because based on confiscatory legislation, they are violative of public policy.

The President has no power to instil into foreign legislation an authority which it does not possess *proprio vigore*. He cannot validate here decrees otherwise invalid, and thus harass and deplete the assets of American citizens.

ARGUMENT.

POINT I.

The public policy of the State of New York, which is the *situs* of the debt represented by the bank deposit, does not permit the recognition of rights based upon confiscation of private property.

The petitioner's claim is predicated upon the Soviet decree of confiscation, under which it is claimed that the Russian State nationalized and appropriated all of the assets of numerous corporations and organizations, including the Metal Company. Such decrees does not provide for the payment of claims of creditors of the Metal Company and does not provide for payment of compensation to stockholders of that Company (Record, pp. 3 and 4). The petitioner's claim, therefore, must stand or fall

on the enforcement of this Soviet decree by the Courts here.

It is well settled that the laws of one country are not enforced in another country as a matter of right, but only under principles of comity. *Bank of Augusta* v. *Earle,* 13 Pet. 519, 598; *Second Russian Ins. Co.* v. *Miller,* 297 Fed. 404, 408; affirmed 268 U. S. 552; *The Apollon,* 9 Wheat. 362; *Hilton* v. *Guyot,* 159 U. S. 113, 163-164, where the Court said:

> "No law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations'."

And in *Matter of Accounting of Waite,* 99 N. Y. 443, at page 448, the Court said:

> "From all these cases the following rules are to be deemed thoroughly recognized and established in this State: (1) The statutes of foreign States can in no case have any force or effect in this State *ex proprio vigore,* and hence the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute * * * the titles of foreign statutory assignees are recognized and enforced here, when they can be, without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here under our statutes; provided also, that such titles are not in conflict with the laws or the public policy of our State."

When, however, a foreign law sought to be enforced here offends our public policy, comity gives way to public policy and the foreign law will not be enforced by our

courts. *Huntington* v. *Attrill*, 146 U. S. 657, 675, where the Court said:

> "If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, * * * we are at liberty to decline jurisdiction."

What, therefore is our public policy with regard to foreign legislation such as the Soviet confiscatory decree in question? The cases are numerous and are discussed at length in the brief of the respondents. Detailed analysis of them here would be only reiteration. But one case is so precisely in point and so conclusive upon the subject, that at the risk of duplication, we venture to discuss it. That case is *Vladikavkazsky Railway Company* v. *New York Trust Company*, 263 N. Y. 369.

That case, too, was brought to recover a bank deposit held by a New York bank to the credit of a nationalized Russian corporation. The plaintiff was the Russian corporation itself. The defendant pleaded the nationalization decrees of the Soviet Government as a bar to the prosecution of the action by the Russian corporation. In that case, too, it was strongly urged that recognition validated the acts of the Soviet government retroactively and that those decrees must, therefore, be given force and effect here. Almost every word of the opinion on these points could have been written for the instant case. The Court stated at pages 378, 379:

> "The deposit was made in New York City, the home of the bank; that is where the contract obligation was created and where it is by its terms to be performed, entirely outside Russian jurisdiction. Laws of foreign governments have extraterritorial jurisdiction only by comity. (*Huntington* v. *Attrill*, 146 U. S. 657, 669.)
>
> "The principle which determines whether we shall give effect to foreign legislation is that of

public policy. (*Russian Reinsurance Co.* v. *Stoddard, supra; Joint Stock Co.* v. *National City Bank*, 240 N. Y. 368, 377; *Russian Socialist Federated Soviet Republic* v. *Cibrario*, 235 N. Y. 255, 263.)

"Where there is confliction between our public policy and comity, our own sense of justice and equity as embodied in our public policy must prevail. (*Russian Socialist Federated Soviet Republic* v. *Cibrario, supra.*)

"It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts. (*Baglin* v. *Cusenier*, 221 U. S. 580.)

"We enforce the same principle even in regard to statutes of sister states. (*Barth* v. *Backus*, 140 N. Y. 230, 239.)

"The fact that the present Russian government was not recognized was not the basis of our refusal to give effect to its decrees nationalizing corporations and confiscating their property. During the period when those decisions were made, we recognized and enforced 'mere ordinary legislation', relating to 'every day transactions of business or domestic life'. (*Petrogradsky M. K. Bank* v. *National City Bank, supra; Matter of People* (First Russian Ins. Co.), 255 N. Y. 428, 432.)

"Prior to recognition we clearly intimated that our decision would have been the same if at the time recognition had been granted. (*James & Co.* v. *Second Russian Insurance Co.*, 239 N. Y. 248, 257.)

"The general statement contained in the opinion in *Salimoff & Co.* v. *Standard Oil Co.* (262 N. Y. 220), to the effect that recognition of a *de facto* government as a *re jure* government is retroactive in effect and validates all the acts of the government from the commencement of its existence, must

> be read in connection with its context and as so read it did not refer to acts sought to be given effect extraterritorially." *

Petitioner, realizing that the *Vladikavkazsky* case presents an insuperable stumbling block to its claim, attempts to distinguish it on the ground that there the question was "shall the law compel a debtor in this State to pay its debt or permit it to hold the property of its creditor indefinitely" and that "there was no refusal to recognize the Soviet Government's title, based on nationalized decrees, for no such question was presented" (Petitioner's brief, p. 40).

It is true that the Soviet government was not a party to the action, but the question of its title was nevertheless passed upon. The point of the decision was that the Russian corporation could maintain its own action for the deposit in spite of the nationalization decree on which the Soviet title is based. The conclusion is, therefore, inevitable that any claim of the Soviet government predicated upon the confiscatory statute, would not be enforced in New York courts.

But the petitioner is further in error in believing that the precise point of the Litvinoff assignment and the claim of the Russian government and of Petitioner was not before the Court, because after the decision, the defendant in the *Vladikavkazsky* case moved for reargument, and on the application for the reargument, stated as follows:

> "The correspondence between M. Litvinoff and the President of the United States, resulting in the fact of recognition of Russian was necessarily involved. Such correspondence was published in full

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*In *Dougherty* v. *Equitable Life Ins. Co.*, 266 N. Y. 71, the Court recognized the authority of the *Vladikavkazsky* case as unimpaired. It directly based its decision that decrees of confiscation afforded a defense upon its view that the insurance policies there in suit were made in Russia to be performed in Russia and specifically provided for construction according to Russian Law. The Vladikavkazsky case has repeatedly been cited and followed by the New York Courts.

> in the newspapers (New York Times, November 18, 1933) and is clearly within the judicial knowledge of the court)."

(Then follows a copy of the correspondence between M. Litvinoff and the President.) The application for reargument then continues as follows:

> "The importance of this correspondence in connection with the decision of this Court is threefold.
>
> "First, I submit it bears upon what should be determined to be the public policy of this State.
>
> "Second, it demonstrates that the alternative assumed by this Court, that failure to allow recovery by the Vladikavkazsky Railway would be to allow the New York Trust Company indefinitely to retain the money is not necessarily so.
>
> "Third, it demonstrates that the New York Trust Company may be put in double jeopardy with respect to this very fund, since it is likely that the claim of the United States thereto will be definitely asserted in the Courts of the United States."

It will thus be seen that the Court was advised that the defendant bank would not be permitted "to hold the property of its creditor indefinitely", and that petitioner's claim was put forth as bearing upon the public policy of the State and as calling for a change in the decision. Motion for reargument was denied (264 N. Y. 595).

But if further authority were needed for the postulate that confiscation of private property without compensation is repugnant to the public policy of the State of New York, there is a wealth of decisions on the subject, many of them dealing specifically with the Russian confiscatory decrees:

In *Dougherty* v. *Equitable Life Assurance Soc.*, 266 N. Y. 71, at page 90, the Court said:

> "Recognition does not compel our courts to give effect to foreign laws if they are contrary to our public policy. Some writers have suggested that non-recognition was an insufficient reason for the refusal of our courts to enforce the laws of another country; rather, it should have been that those laws were contrary to our public policy."

See, also,

James & Co. v. *Russian Insurance Co.*, 247 N. Y. 262;
Petrogradsky M. K. Bank v. *National City Bank*, 253 N. Y. 23;
Matter of People (*Russian Re-Insurance Co.*), 255 N. Y. 415;
Russian Re-Insurance Co. v. *Stoddard*, 240 N. Y. 149;
Sokoloff v. *National City Bank*, 239 N. Y. 158;
James & Co. v. *Second Russian Insurance Co.*, 239 N. Y. 248.

The New York doctrine has always been the same. Nearly 100 years ago, in 1852, a slave holder, a resident of Virginia, where slavery was lawful, was passing through New York with 8 Negro slaves. A writ of habeas corpus to obtain their freedom was sued out and was sustained. *Lemmon* v. *People*, 20 N. Y. 562. The Court said:

> "Instead, therefore, of recognizing or extending any law of comity towards a slave holder passing through her territory with his slaves, she (the State of New York) refuses to recognize or extend such comity, or allow the law of the sovereignty which sustains the relation of master and slave to be administered as a part of the law of the State."

And the Court also stated at pages 608-9:

> "But where the laws of the several States differ, a citizen of one State asserting rights in an-

> other, must claim them according to the laws of the last mentioned State, not according to those which obtain in his own."

Cited in *Flash* v. *Conn*, 109 U. S. 371, at 377.

In *F. A. Strauss & Co.* v. *Canadian Pacific R.R. Co.*, 254 N. Y. 407, there was a shipment from a British port to a British port, under the British flag, and the bill of lading stated that the contract should be construed according to the law of Great Britain, but the Court stated at page 414:

> "As a general rule the validity of a contract is determined by the law of the jurisdiction where made, and if legal there, is generally enforceable anywhere. There is, however, a well established exception to the rule, to the effect that a Court will not enforce a contract, though valid where made, if its enforcement is contrary to the policy of the forum."

The sanctity of public policy is jealously defended by the New York Courts. The recent case of *Holzer* v. *Deutsche Reichsbahn Gesellschaft*, 159 Misc. 830, is in point. In that case a Jewish citizen of Germany brought suit against defendants for damages for breach of an employment contract made in Germany. Defendants (German citizens also) admitted that the sole ground of the discharge of the plaintiff, was plaintiff's race and religion, but pleaded as a defense to the action that such discharge was required under the law of Germany. The Court stated at page 839:

> "Suppose the German law declared forfeited to the German government all property of German Jews, wherever the property be situated. A Jew in Germany has securities in a New York vault. Would the courts of New York aid the German government in enforcing the German law, and order

> the securities of the German Jew delivered to the German government?
>
> "To ask these questions is to answer them."

and at page 840:

> "We do not go out of our path to manifest disrespect for a foreign government. We are not sitting in judgment on the acts of the German government; we are dispensing justice according to our own public policy. Such is the recognized exception to the rule *loci contractus.*"

It will be recalled that about a year ago the same issues as are present in the instant case were before this Court in the cases of *United States* v. *Bank of New York & Trust Company, United States* v. *President and Directors of the Manhattan Company, United States* v. *Pink,* as Superintendent of Insurance, when the government appealed from judgments dismissing its several complaints. All these cases were based on the same Litvinoff assignment and a similar confiscatory Soviet decree. This Court affirmed the dismissal on the ground that the State Courts had taken jurisdiction of the assets in all these cases and remitted the petitioner to those courts for any remedy it might have.

Thereafter, the petitioner went into the State courts in each of these cases.

In the *Bank of Manhattan* case, petitioner moved to terminate the proceedings pending under an assignment for the benefit of creditors, and to turn over the fund to it. The Court held that the relief could not be had by motion and remitted petitioner to an action (New York Law Journal, March 13th, 1936, Special Term, Part I, Supreme Court, New York County, McGeehan, *J.* Not reported in Official Reports). Petitioner thereupon brought an action on a complaint very similar to the complaint in the present action, and of course, predicated on the Litvinoff assignment and the decree of confiscation. The Court dis-

missed the complaint (New York Law Journal, Special Term, Part I, New York County, September 4th, 1936, not yet reported in official report). The Appellate Division unanimously affirmed (New York Law Journal, Appellate Division, First Department, January 30, 1937. Not yet reported in official reports).

In the *Pink* (*First Russian Insurance Co.*) case, petitioner made a motion for the termination of the Superintendent's liquidation proceedings and to acquire possession of the fund. Again the Court denied the motion and remitted the petitioner to an action (New York Law Journal, March 13th, 1936, Special Term, Part I, Supreme Court, New York County, McGeehan, *J.* Not reported in Official Reports). On appeal the order was affirmed by the Appellate Division (248 App. Div. 723) and leave to go to the Court of Appeals was denied in both the Appellate Division and the Court of Appeals (248 App. Div. 870). Petitioner has not yet begun the action.

In the *Bank of New York* case, petitioner moved to intervene in the proceeding then pending in the State Court. That motion was granted (New York Law Journal, March 13th, 1936, Special Term, Part I, Supreme Court, New York County, McGeehan, *J.* Not reported in Official Reports), and on intervention, petitioner's claim, which again of course, is based on the Litvinoff assignment and a decree of confiscation, was referred to James F. Donnelly, as Referee to hear and determine. The Referee over a period of months, took proof of the petitioner's claim, and heard a number of witnesses, including some specially brought from Soviet Russia, to testify on the question of Soviet Law. The Referee in a learned and exhaustive opinion dismissed the petitioner's claim.

The Referee decided that the property was located in New York.

He decided that the public policy of New York would apply.

He decided that the confiscatory decrees were in violation of New York public policy.

He decided that if the Federal public policy was applicable, it was to the same effect as the New York public policy, and after hearing the testimony, which, so far as we are able to find, is the first time that actual testimony has been offered by the petitioner in support of its claim, he found that the Soviet State had not itself legislated or intended that its confiscatory decrees should apply to property situated extra-territorially. He ends his opinion with these words:

> "But the case made out by the decrees themselves, the manner in which they were understood at home and interpreted at home and abroad, requires a finding that they were strictly territorial in effect and were so intended when enacted."

Legislative Expression.

But the public policy of New York is to be found not only in the decisions but in legislation as well.

The Legislature of the State in May of 1936, enacted Section 977-b of the Civil Practice Act, in which a complete and comprehensive scheme for the liquidation of assets in New York of nationalized corporations is set forth. Under it provision is made for the appointment of a Receiver of such assets, for the advertising and investigation of claims, for the payment of creditors and for the disposal of the surplus to stockholders or others who may be entitled thereto. The public policy of the state was crystalized and made definite in this Legislative enactment as follows, being sub-division 19 of Section 977-b of the Civil Practice Act:

> "Any receiver appointed pursuant to the provisions of this section may be substituted for such corporation in any action or proceeding pending in the courts of the state or of the United States to which such corporation is a party and may revive any action which shall have abated, and

such liquidation, dissolution, nationalization, expiration of its existence, or repeal, suspension, revocation, or annulment of its charter or organic law in the country of its domicile shall not be deemed to have any extra-territorial effect or validity as to the property, tangible or intangible, debts, demands, or choses in action of such corporation within the State or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in the state."

In view of all of the above, it may be said beyond cavil that the Russian confiscatory decrees are in violation of the public policy of the State of New York and will not be enforced in its courts.

Situs.

Petitioner, finding itself faced with the unsurmountable wall of authority in New York, seeks to flee the jurisdiction. The claim is made that the bank deposit in suit, which from its inception has always been actually located in a bank in New York, is legally located in Russia. The suggestion has at least the merit of novelty. The argument is that a bank deposit has two correlative elements, one, the obligation in the debtor to pay, the other, the right in the creditor to receive, and that the situs of the right to receive is located in the domicile of the creditor, therefore, the laws of the domicile of the creditor govern the right to receive.

True, there is in the creditor a right to receive, but it is a right to receive according to the laws and public policy of the debtor's domicile, where payment is to be made, where performance is to be had, and where the obligation is located.

The right to receive is subject, like all of the creditor's other assets, to a certain dominion by the sovereignty of his domicile. Thus the sovereignty of the domicile may tax the right to receive. It may prescribe its local devolution. What petitioner overlooks is, that though these

prescriptions of the domicile may have the force of law therein, they are not enforced in the jurisdiction of the debtor as a matter of right, but only as a matter of comity, and only when in accord with the latter's public policy. The laws of the creditor's domicile in respect to the right to receive have no more sanctity than any other of its legislative acts.

New York Court will not enforce the right if any step in its acquisition or conveyance, whether by contract or foreign legislation, violates its public policy or is shocking to its sense of justice and equity.

Petitioner's view of the law would lead to endless confusion. No debtor would ever know the extent of his obligation were he bound by whatever foreign law might be enacted in whatsoever jurisdiction the creditor might choose to dwell. The creditor's right to receive is to receive according to the law of the place of payment.

The law that bank deposits have their locality and situs at the place of the deposit and are governed by the law of that place and that such law has complete dominion over them is so well established, that it is difficult to believe that the petitioner can be serious in the argument that the situs of this deposit is in Russia.

There is a wealth of cases on the subject. The leading authorities have been cited and so thoroughly discussed in the brief of the respondents Belmont, pages 12 to 24, that the Court should not be burdened with further discussion of and quotation from them here.

One additional case, however, should be considered. The case is *Blackstone* v. *Miller*, 23 Supreme Court Reports 277. Though the case has been overruled as to taxing power of the states, so far as we find no one has questioned the reasoning of Judge Holmes on the point of the situs of a bank deposit for other purposes. This Court by Judge Holmes said:

> "What gives the debt validity? Nothing but the fact that the law of the place where the debtor

is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So, again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation and extend to debt the rule still applied to slander that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations to one side, it is plain that the right of the foreign creditor would be gone.

"Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death. The maxim *mobilia sequuntur personam* had no more truth in the one case than in the other. When logic and the policy of a state conflict with a fiction due to historical tradition, the fiction must give way."

Situs of a right to receive is at best only a fiction which may be useful for limited purposes, such as taxation. It can not be permitted to override fact and well established law. Petitioner then piles Ossa on Pelion by adding to the fiction of the situs the doctrine of *mobilia sequuntur personam*. In other words, a fiction superimposed on a fiction. But even this second fiction will not hold because *mobilia sequuntur personam* has been created for and applies in the main only to decedent's estates.

This Court said in *Burnet* v. *Brooks*, 288 U. S. 378, at 391:

"It is insisted that the maxim *mobilia sequuntur personam* applies in this instance and that the situs

> of the property was at the domicile of the owner in France. But this Court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it."

The New York Court of Appeals said in *Hutchinson v. Ross*, 262 N. Y. 381, at 388:

> "The maxim '*mobilia sequuntur personam*' cannot always be carried to its lgoical conclusion. Practical considerations often stand in the way. Physical presence in one jurisdiction is a fact, the maxim is only a juristic formula which cannot destroy the fact."

Though for specific purposes such as taxation, the right to receive may have a situs at the domicile of the creditor, the situs of the debt, for the purpose of the enforcement thereof, is determined according to the law of the domicile of the debtor, in other words, the place of payment. *Vladikavkazsky RR. Co.* v. *New York Trust Company, supra. Matter of Houdayer*, 150 N. Y. 37, *Zimmerman* v. *Southerland*, 274 U. S. 253, *Clark* v. *Williard*, 294 U. S. 211.

POINT II.

The public policy of the United States does not differ from that of New York.

Petitioner, apparently being turned out of New York and not sure of being admitted to Russia, also argues that if public policy is to be considered at all, it is Federal public policy and not the public policy of the State of New York which must prevail.

We submit, in view of the fact that the situs of the deposit in question is in New York and is governed by

New York law, that clearly New York public policy is the only public policy to be considered.

The Federal Courts may not be used to evade the public policy enforced by the State Courts, but as to matters governed by State Law, Federal Courts will apply the law and public policy of the state, and will not enforce a foreign law or one violative of the state public policy.

In *Moore* v. *Mitchell* (1928) 28 Fed. (2nd) 977, the Court said at page 998:

> "As a result of what has been said, I do not conceive it to be the duty of this court, notwithstanding the weight of insistence to the contrary, to undertake the enforcement, within the State of New York, of the revenue laws of Indiana. The course of procedure to be followed by a federal court, when asked to apply the law of a foreign state in a manner that is not permitted by the law of the state within which the court functions, is outlined in *Pennoyer* v. *Neff*, 95 U. S. 714, and *Parker* v. *Moore* (C. C. A.), 115 Fed. 799."

This case was affirmed in the Circuit Court of Appeals (30 Fed. [2nd] 600), concurring opinions being written by Judge Manton and Judge Hand. Judge Hand said (p. 604):

> "Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign state, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the public policy of the domestic state."

This case was affirmed by the Supreme Court (281 U. S. 18). In the course of the opinion Mr. Justice Butler said (p. 23):

> "The United States District Court of New York exercises a jurisdiction that is independent of and under a sovereignty that is different from that of

> Indiana (*Grant* v. *Leach & Co.*, 280 U. S. 351; *Pennoyer* v. *Neff*, 95 U. S. 714, 732). And, so far as concerns petitioner's capacity to sue therein, that court is not to be distinguished from the courts of the State of New York (*Hale* v. *Allinson*, 188 U. S. 56, 68)."

In *Becker* v. *Interstate Business Men's Association*, 265 Fed. 508, the Circuit Court of Appeals was asked to enforce in Kansas an insurance contract which was admittedly contrary to the public policy of Kansas. The Court said (p. 510):

> "It is the public policy in force in Kansas, where this action was brought, which is to be sought (Citations); and this public policy, if not controlled by the Constitution, treaties, or laws of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, is governed by the laws of the state as disclosed by the constitution or statutes or by the decisions of its highest courts (*Hartford Ins. Co.* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 175 U. S. 91)."

But if Federal public policy is the criterion, it does not differ on the points in issue from New York public policy. As the Court below said:

> "If the public policy of the United States is material, it would seem clearly adverse to a claim based on the Russian decree."

The authorities to the effect that confiscation is contrary to the constitution, law and public policy of the United States are legion. In *United States* v. *Perchman*, Chief Justice Marshall said:

> "The sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled."

In *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, the Court said:

> "As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for private use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments."

The petitioner claims that the assignment was procured for the benefit of the United States government and its citizens having claims against the Soviet government (Petitioner's brief, p. 8) and that the public policy of the United States favors the settlement of the individual claims of its citizens, and that consequently the public policy of the United States accords with the right acquired under the assignment.

That is nothing less than saying that the end justifies the means, no matter how immoral the latter may be.

It may be conceded for the sake of argument, that the settlement of the claims of its citizens is not opposed to Federal public policy, but it certainly does not follow that any means taken to procure such settlement would not offend that very public policy. Granted that the Executive should attempt to secure a settlement of the claims of its government and its citizens, still that end must be attained only through moral means and those which do not violate American public policy beyond all question. Especially when the end is to be attained through the action of the Courts, the Executive may not rely upon means which shock the Courts and violate the very laws and public policy, which the Courts are instituted to maintain and defend. Even if we concede that the Executive may accept from foreign governments claims against American citizens the proceeds of which are to be applied to the

settlement of debts owing to other American citizens by the foreign government, if these claims depend upon a devolution of title which is otherwise invalid and unenforceable in our courts, obviously the claims do not become valid and enforceable merely because the proceeds thereof will be applied to debts owing American citizens.

To use an extreme illustration, suppose that the Executive had agreed as a step in the settlement of the claims of this government and its nationals, that each American creditor for each $1,000 of his claim should receive here and hold in slavery one Russian citizen—could it be gainsaid that though the settlement of the claims of American citizens was favored by public policy, that nevertheless, in this instance, public policy was violently offended because as a means to that end a human being was held in slavery?

Would any Federal Court uphold such an agreement?

So, in the case at bar, in order to accomplish the laudable end of settling American claims, the President has attempted to make an agreement which in view of our Courts is based upon a title no better than that of a receiver of stolen goods.

We refuse to believe that public policy of either the Federal or State governments can be stretched so far, even to the end of settling the claims of its citizens.

The books are full of cases showing that for 20 years multitudes of creditors, domestic and foreign, of the nationalized Russian corporations have been attempting to collect their debts out of the assets located here of their Russian debtor.

As we will show in our Point III, the last part of the Litvinoff assignment was inserted for the purpose of giving recognition and validity to the rights of these very creditors to reach such assets. These rights are priceless, constituting as they do in many cases, the only source from which collections of judgments may be had.

It certainly is not in accord with public policy to

despoil these American citizens of the means of satisfying their judgments in the endeavor to secure the settlement of the claims of other American citizens accruing out of confiscations in Russia.

Federal public policy is the last that should be invoked to sustain confiscation, and especially as a step in the settlement of its citizens' claims.

From its inception our government has insisted that there could be no confiscation of the private property of its nationals by a foreign power even within the latter's confines. 6 Moore's International Law Digest, Sec. 997.

In seeking to enforce the Litvinoff assignment in the United States Courts *by arguments of public policy* however, petitioner comes to a wholesale acceptance of the confiscatory decrees of Soviet Russia, and a negation of our established tradition of the inviolability of private property.

But in the process the United States may have dealt a mortal blow to the American private claims; for if the Court, at the instance of the United States government, declares it a part of American public policy that Soviet confiscatory decrees may take away the property located here out of which one set of American citizens may satisfy their judgments, we cannot conceive the possibility of the United States ever extracting from Soviet Russia an admission of liability because the Soviets took away the property of another set of American citizens there.

No other country has urged in its own courts Soviet public policy as its own public policy.

Public policy is not the pliable concept that petitioner would have it. Public policy does, within limits, change with the times; but certain fundamentals of national policy survive all changes short of social revolution. These fundamentals "establish a standard for our Government which the Constitution does not make dependent upon the standards of other governments" (*Russian Volunteer*

Fleet v. *United States*, 282 U. S. 481, 492). The confiscation of property without compensation remains repugnant to our scheme of things. The fiat of an executive officer cannot unsettle premises imbedded in our social order. Petitioner would have us believe that the whole question is merely one of foreign relations.

Only confusion is wrought by thinking of the problem as one in foreign relations. The question of the recognition of Russia is, of course, a matter both federal and executive. The disposition of private rights within the jurisdiction of a Court of New York is a matter neither federal nor executive.

POINT III.

Properly construed, the Litvinoff assignment excludes the deposit in question.

This follows:

(a) From the language of the instrument itself; and

(b) From the background of law and facts existing when the assignment was made.

(A)

The Language of the Instrument.

To uphold the construction contended for by the United States an important part of the instrument must be held meaningless. The United States contends that the words "or otherwise" were used in order to include claims of Russian nationals against American nationals which had been confiscated by the Soviet Government. In effect, it says that the first part of the instrument should be construed as if it read as follows:

> "• • • the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new

> litigation for the amounts admitted to be due or which may be found to be due it, as the successor of prior Governments of Russia, *or as the successor, by confiscation, of Russian nationals in respect of property or rights, justiciable in American courts, in which such Russian nationals may have had an interest* • • • and does hereby assign such amounts to the Government of the United States • • •."

It will be observed that the italicied words exactly describe the class of rights to which the claim in the instant case belongs. If the words "or otherwise" embrace this class and if the claims in this class were intended to be assigned, why did the Soviet Government, in the very next paragraph of the letter, feel called upon to agree not to assert any ownership of such claims? Why did it feel called upon to say:

> "The Government of the Union of Soviet Socialist Republics *further* agrees, preparatory to the settlement referred to above not to make any claim with respect to:
>
> (a) judgments rendered *or that may be rendered* by American courts in so far as they relate to property, or rights or interests therein, in which the Union of Soviet Socialist Republics, *or its nationals may have had* or may claim to have *an interest.*" (Italics ours.)

Does one assign a chose in action and then agree not to lay claim to it? Does one convey land and not only warrant the title but agree not to attack the title? That would not be expected where the contracting parties are the humblest citizens. It is unthinkable where the contracting parties are the heads of mighty nations.

The conclusion seems inescapable that the claims referred to in the first paragraph of the letter, and thereby assigned to the United States and "the property, rights, or interests therein" of Russian nationals referred to in the paragraph marked (a) were not the same rights. But the rights referred to in paragraph (a) clearly include

the right which is the subject of this litigation, since it is a right in which a Russian national "may have had or may claim to have an interest". That right was not assigned to the United States Government.

(B)

The Background of Law and Fact Existing When the Assignment Was Made.

The history of the Russian revolution, including the confiscation of private property by the Soviet Government, was, in the year 1933, known throughout the civilized world. The controversy as to the extra-territorial effect to be given to the Russian confiscatory decrees had, for eighteen years, raged upon battle-fronts no less numerous than those of the World War. Educated men generally—the contracting parties here, certainly—knew the answer given by the courts of many lands to the question: Did the confiscatory decrees confer upon the Russian Government title to property not located within the boundaries of Russia?

that Switzerland had answered that question in the negative: *Wilbuschewitz* v. *Zurich* (1926), 53 Clunet 1110, 1113 (Trib. Fed) (1925-26), Ann. Dig. of Int. L. Cases 96 (before recognition);

that Denmark had answered it in the negative: *Council of Russian Orthodox Community in Copenhagen* v. *Legation of R. F. S. F. R.* (1925-26) Ann. Dig. of Int. Law Cases 24 (Supt. Ct. of Denmark) (after recognition);

that Germany had answered it in the negative: *Ginsberg* v. *Deutsche Bank* (1928), Juristiche Wochenschrift 1232, 1233 (Kammergericht, Berlin) (after recognition);

that France had answered it in the negative: *Etat Russe* v. *Ropit* (1925), 52 Clunet 391 (Trib. Comm. Marseille); (1926) 53 Clunet 667 (Cour d'Appel) (Translation in Hudson, Cases on Internal Law [1929] 137); (1928) 55 Clunet 674 (Cour de Cassation) (after recognition);

that Great Britain had answered it in the negative: *The Jupiter* (No. 3), 1927 P. 122 (aff'd Ct. of Appeal, 1927, P. 250 (after recognition);

that New York had answered it in the negative:

Vladikavkazsky Ry Co. v. *N. Y. Trust Co.*, 238 App. Div. 581 (before recognition);

Petrogradsky M. K. Bank v. *National City Bank*, 253 N. Y. 23 (before recognition);

Matter of People (*Russian Re-Insurance Co.*), 255 N. Y. 415 (before recognition);

James & Co. v. *Russia Insurance Co.*, 247 N. Y. 262 (before recognition);

Russian Re-Insurance Co. v. *Stoddard*, 240 N. Y. 149 (before recognition);

that the United States had answered it in the negative: *Second Russian Ins. Co.* v. *Miller*, 297 Fed. 404 (before recognition); *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. (2) 396, 401 (before recognition);

and lastly, but not least important, Soviet Russia had itself answered it in the negative: R. S. F. S. R. *Circular No. 42*, sent to Soviet plenipotentiaries abroad; *Circular No. 194*, issued Sept. 20, 1923, by the Commissariat of Justice; *Circular No. 329*, issued August 23, 1925, by the People's Commissariat for Foreign Affairs; *decision No. 124*, of October 16, 1924, by the Third Department of the People's Commissariat of Justice*;

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*In Circular No. 194 it is stated:

"Proprietary rights of citizens of the R. S. F. S. R. enforcible outside the R. S. F. S. R. are governed by the laws of the country where they are to be enforced."

and in the Circular issued by the Soviet People's Commissariat for Foriegn Affairs, No. 42, it is stated:

"The Law on Property established by the decrees of the Russian Soviet Government does, therefore, determine only legal relations pertaining to property rights as arise on the territory of the R. S. F. S. R. Legal relations pertaining to property rights whereof the subject-matter is situated outside the territory of the R. S. F. R. and is not connected with such territory cannot be governed outside the territory of the R. S. F. S. R. by Russian Law and are—irrespective of the nationality of the persons entitled to such rights, be they even Russian Citizens—subject to the effects of Local Law."

These circulars were construed as Russian law by HILL, *J.*, in *The Jupiter*, P. (1927) 120, at 144. Affirmed, Court of Appeal, P. (1927) 250. Moreover,

and finally they must have known that there is no reported instance in which the Soviet Government has sought to assert, in the courts of other lands, title to claims such as the one under consideration here, and been successful.

With that background of knowledge, is it conceivable that, if the contracting parties had intended to include such claims in the assignment, they would not have specifically mentioned them (as they did the claim of the Russian Volunteer Fleet against the United States) and not have hidden the light of their intention under that bushel of ambiguity—the words "or otherwise"? Would they not at least have said that the claims assigned were those due the Union of Soviet Socialist Republics "as successor of prior Governments of Russia or of prior Russian corporations"? We think the answer must be that the words "or otherwise" were not meant to refer to such claims because the parties knew that title thereto was not claimed by the Soviet government and that such title, if claimed, would not be enforced outside of Russia.

What, then, was meant to be included under the words "or otherwise". Again history affords the answer. During the war and prior to the Bolshevik revolution the Imperial and Kerensky governments had financed vast

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in the latest declaration of the British courts on the subject, *In re Russian Bank for Foreign Trade*, Chancery Decisions, 1933, page 745, MAUGHAM, *J.*, at page 759 states:

> "As will be seen later, the Soviet Goverment does not itself assert that the nationalization decrees have an extra-territorial effect."

and then goes on to say at page 767:

> "The decrees in question could not according to our laws have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic. This follows, I think from the decisions of HILL, *J.*, and the Court of Appeal in *The Jupiter*. It is interesting to note that the same view is taken by the R. S. F. S. R. itself in a circular dated April 12, 1922, and in a circular issued by the People's Commissariat of Justice to all District Courts dated September 26, 1923, which are set out in the elaborate judgment of HILL, *J.* above referred to. These circulars show that the Soviet Government does not regard the nationalizing decrees as having any extra-territorial effect even as against Russian citizens."

purchases of war supplies in this country (*Lewine* v. *Nat. City Bank,* 248 N. Y. 365). Many millions of dollars were on deposit in American banks to the credit of the Russian government or its nominees. Title to these funds clearly vested in the Soviet government as successor to the Imperial and Kerensky governments. But there were other funds as to which the Soviet title was not so direct. For example, moneys standing to the credit of the Vladikavkazsky Railway Company, which, it was claimed, had actually been furnished by the Russian government and hence might be claimed by it. Again, it will be recalled that after the downfall of the Kerensky Government, before the Soviets consolidated their position and brought under their control the territory which they have since dominated, there was a period during which various local and independent governments were set up, such as the Omsk All Russian Government, as to which the Court of Appeals of New York said:

> "It is a matter of common knowledge and the moving papers establish the fact that if the Omsk All Russian Government was at any time even a *de facto* government in the international sense, it was created as such with Admiral Kolchak at its head at Omsk in November, 1918, and recognized by General Seminoff and his force at Vladivostok, and thereafter driven out of all regional control by the Bolshevik government, not later than March, 1920.
>
> "During its ephemeral and disastrous career, it asserted its authority over a portion of the inhabitants of the former Russian Empire who had, after the debacle, separated themselves from the central government and established an independent sovereign government over a limited territory in Siberian Russia. *It was not a subordinate state nor a civil division of the Soviet Republic*" (*Nankivel* v. *Omsk All Russian Government,* 237 N. Y. 150, at 156). (Italics ours.)

Of course, the Soviets would not want to recognize such pretended governments as these in the sense in which they were willing to acknowledge the Imperial and Kerensky Governments, as "prior" governments. Yet they would not be content to waive claim to any assets the pretended governments might have here. To give such meaning to the words "or otherwise" is but to read them in the light of history. To give them such meaning as the petitioner would give them is to shut our eyes to history.

POINT IV.

Assuming, without conceding, that the president had the power to accept from a foreign government claims against an American citizen, he did not have the power by the mere acceptance of a claim to breathe into it life which it otherwise would not have.

Throughout its brief the United States refers to the exchange of letters between the President and M. Litvinoff as an "executive agreement" (See pp. 2, 3, 33, 51, etc.). Such, of course, it was. This executive agreement has never been ratified by the Senate, nor has force been given it by any act of Congress. In so far as the "agreement" constituted the diplomatic recognition of the Soviet government, no one questions the President's power to make it and to make it without the authority of or concurrence by Congress or either of its branches. But what of the President's power, without the concurrence of Congress, to accept, on behalf of the United States an assignment of claims of a foreign government against American citizens, *otherwise unenforceable by the as-*

signor, and to agree to account to the foreign government for collections made?*

It is apparently conceded by the petitioner that the bank deposit in this case could not have been collected by the Russian government itself. Its contention seems to be that the act of the President alone breathed life into this comatose body. It contends that a claim, which the Russian government could not enforce because contrary to public policy, becomes enforceable and entirely in line with public policy, by the mere act of the President in accepting the assignment.

But the President has no power to instil into foreign legislation authority which it did not possess *proprio vigore*. This has heretofore been the view of the Executive Department itself:

In 1883 the Canadian Parliament authorized the erection of a bridge across Niagara River, work not to begin "until an act of the Congress of the United States of America has been passed, consenting to or approving the bridging of said river, or until the Executive of the United States has consented to and thereof approved". The President asked the Attorney General for his opinion as to the President's power in the premises. The Attorney General replied (17 Opp. Atty.-Gen., 523):

> "The President can perform no act *officially* except it be authorized by the Constitution and laws.

*It is a matter of grave doubt whether the President under any circumstances, has the power, without the sanction of Congress, to accept and enforce any claim of a foreign government against an American citizen. Certainly, there is no express authority for such power to be found in either the Constitution or the statutes. It does not by its nature attach to the functions of the Executive as a necessary power. It cannot be justified by precedent. We have combed the archives of the State Department from the founding of the government to the present day, and we find, among 96 executive agreements negotiated by the President relating to claims, one, and only one in which the President undertook to deal with a claim of a foreign government against an American citizen. That claim was a *counter-claim*, and the agreement was careful to recite that it was made *with the consent* of the citizen and his attorney (*United States* v. *Guatemala*. Protocol of Agreement submitting to arbitration the claim of Robert H. May against Guatemala and the claim of Guatemala against said May. Signed at Washington, February 23, 1900, Text: Treaty Series 150; Malloy, Treaties I: 871-873.)

His consent in the present case, not being thus authorized, would be an extra official act.

"I beg to refer, in this connection, to an opinion of Attorney-General Cushing, in a case in which a similar question arose. A legislative act of a British colony provided for certain proceedings for the arrest and punishment of deserting seamen of any foreign nation, where the government of such nation or state had by its proper officer signified its desire that the act might be enforced against the crews or ships belonging to such nation or state. The inquiry was, whether the President of the United States, as such, had authority, by so signifying his desire. to give general effect to that act. It was held that he had not. *'Neither the Constitution of the United Etates, nor the treaties between this Government and that of the United Kingdom, nor any acts of Congress (observes Mr. Cushing) empower the President to communicate to the law of a foreign state authority or effect, which it does not possess proprio vigore as a law of such foreign state.* • • • Suffice it now to say, that, in my judgment, the Government of the United States can give express sanction to the law before me in no other way, in the first instance, save through a treaty or an act of Congress.' (6 Opin. 209.)

"On grounds already intimated, I am of opinion that the President can not with propriety grant the application of the Bridge Company." (Italics ours.)

Would this opinion have been different if the consent had been a "rider" tacked on to a diplomatic recognition of the Government of Canada? The answer would seem obvious. The President has no power to validate claims and causes of action against American citizens, theretofore unenforceable, and in that way harass them and deplete their assets.

The petitioner, citing *U. S.* v. *Curtiss Wright Export Corp.* No. 98, decided by this Court December 21st, 1936, seems to assume that because a question of foreign rela-

tions is involved, the President's powers are unlimited. But the President's power even in the field of foreign relations is prescribed. As the Court said in *United States* v. *Western Union Telegraph Co.*, 272 Fed. 311 (aff'd 272 Fed. 893 and reversed by consent in 260 U. S. 754), where the President sought, by executive order to prevent the laying of a cable between Cuba and Miami, Florida, at page 313:

> "If the President has the original power sought to be exercised, it must be found expressly, or by implication, in the Constitution. It is not sufficient to say that he must have it because the United Sates is a sovereign nation and must be deemed to have all customary national powers. *Knox* v. *Lee*, 12 *Wall.* 457, 20 L. Ed. 287. However true this may be, it does not follow that the Executive has the necessary authority."
>
> • • • • • •
>
> "The implications of the power contended for by the government are very great. If the President has the right, without any legislative sanction to prevent the landing of cables, why has he not the right to prevent the importation of opium on the ground that it is a deleterious drug, or the importation of silk or steel because such importation may tend to reduce wages in this country or injure the national welfare? In the same way, why does not the President, in the absence of any act of Congress, have the right to refuse to admit foreigners to our shores, and to deport those aliens whose presence he regards as a public menace?"

We look in vain for any statute which confers upon the President the power to accept assignments of claims of the kind here involved. We look in vain for any provision of the Constitution which confers upon him such a power. True the Constitution confers upon him the power "to receive ambassadors and ministers". But does this mean that he can attach to such reception conditions which vitally affect *and materially change* the

private rights of American citizens? That such rights were here affected and were here changed, if the petitioner's claim is upheld, is obvious. The moment before the letters were exchanged, Russia had a claim against Belmont growing out of the confiscation which could not have been enforced, because to do so would violate the public policy of New York and of the United States. The moment after the exchange, the United States stepped into the shoes of Russia, the public policy of the United States on this was reversed and became fixed (because, according to petitioner, "the Executive has declared in favor of the enforceability of the right herein asserted", Petitioner's brief, p. 34), and the unenforceable claim against the American citizen became enforceable. We confidently assert that no such power resides in the President.

Conclusion.

The claim of the petitioner herein, based on the confiscatory decrees of Russia and the Litvinoff assignment, have now been before the courts many times. The United States District Court, the Circuit Court of Appeals, the Supreme Court of the State of New York and the Appellate Division of that Court have all dismissed the complaint on the merits A learned Referee has dismissed the complaint after hearing all the proof that the petitioner could adduce in support of its contentions. The reasons for this overwhelming preponderance of judicial opinion are apparent.

We are confident that this Court will not sustain a claim masked behind a series of fictions which outrage the facts, and predicated upon a confiscatory decree which has been described by the highest court of the State of New York as "*brutum fulmen*" and as "shocking to our sense of justice and equity".

POINT V.

The judgment and order of the District Court dismissing the Second Amended Complaint and of the Circuit Court of Appeals in affirmance thereof were correct, and should now be affirmed.

Respectfully submitted,

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